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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1963.

No. 932

EUNICE BYRTH,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the Court of Appeals for the Eighth Circuit.

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To the Court of Appeals for the Eighth Circuit.

Petitioner prays that a Writ of Certiorari be issued to review the opinion of the United States Court of Appeals for the Eighth Circuit entered on the 17th day of February, 1964.

OPINION BELOW.

The Opinion of the Court of Appeals (Appendix, Infra), is not yet reported.

JURISDICTION.

The judgment of the Court of Appeals was entered on the 17th day of February, 1964 (Appendix, Infra). The jurisdiction of the Court rests under 28 U. S. C. 1254 (1).

QUESTION PRESENTED.

1. Whether the alleged incomplete search of informer's body and clothing prior to his stakeout failed to exclude every reasonable hypothesis that the narcotics were secreted on his person or obtained from a hidden stash while the informer was outside the view of the agents.

2. Whether the observation of the informer was continual during the events on the dates in question so as to exclude equally every reasonable hypothesis that the informer could have acquired the narcotics from a stash near his home and not from the defendant.

3. Whether or not the evidence as a whole was sufficient to sustain a verdict of guilty beyond a reasonable doubt. That defendant sold to informer the narcotics in evidence or that defendant has possession of the narcotics.

4. Whether or not the Court of Appeals erred in finding that informer **undoubtedly** came within the view of Demorest when he left the view of Snokhouse in that such a finding is unsupported by any evidence (See Opinion, page 8, line 29.)

5. Whether or not the Appeals Court went beyond the evidence in so finding that Agent Snokhouse had illuminated binoculars. (See Opinion page 3, line 26.)

STATEMENT OF FACTS.

Defendant by Grand Jury Indictment was charged in four counts with the illegal possession and sale of narcotics. Its indictment charges that in May, 1962, defendant sold a certain quantity of narcotic drug to one Frederick Ray for the sum of $100.00. The hearing of this matter was had on April 4, 1963 without a Jury, trial by Jury having been previously waived by defendant. The government on that date dismissed Counts I and II and proceeded on Counts III and IV of the Indictment.

The Government presented two main witnesses who were supposed to have been in the vicinity on the night of August 7, 1962. The two persons were Agents Jimmie Snokhouse and Edward Demorest.

Agent Snokhouse testified that on the date he had a meeting with Agent Demorest and several other agents, and Frederick Ray on the 7th day of May, 1962. That he had searched Ray and then had proceeded to go on Labadie Avenue where he concealed himself across the street in front of 3822 Labadie Avenue where Frederick Ray lived. It was dark and agent Snokhouse had been furnished spy glasses. He had briefly searched Ray before going to this destination (Transcript page 6, line 15), he stated that he searched Ray while Ray was seated. He went through his pockets, around his ankles (Transcript page 7, line 3, through line 8).

Agent Snokhouse testified further that he was parked on the North side of Labadie about 50 feet from Frederick

Ray's home. Subsequently, he saw Frederick Ray coming from East where he sat down on the steps of the house at 3822 Labadie. Later, according to agent Snokhouse, defendant Byrth arrived in a taxicab. He seated himself next to Ray and they exchanged something, but the agent did not know what it was (Transcript page 12) this occurred about 9:25 at night.

Later, according to testimony, Ray and Byrth walked West on Labadie Avenue, stopped and talked, and Byrth proceeded West and Ray came back to 3822 Labadie and again seated himself upon the steps. Later Ray left and proceeded East on Labadie where agent Snokhouse lost sight of him (Transcript page 22). Agent Snokhouse testified that he knew that Ray was a narcotics addict and had been to the penitentiary several times.

Agent Demorest testified that he had put Ray out of the car on the corner of Labadie and Prairie Avenue. That he searched Ray, gave Ray $100.00 and that he observed Ray until Ray turned and went to a house on Labadie. The search he made was detailed but not a strip search (Transcript page 58). He did not remove Rays shoes (Transcript page 59) Ray was observed by him until Ray was one-third the way down the block where he passed from view (Transcript page 60).

He later saw Ray walking in his direction. Both agents testified that they saw no one else talk to Ray and upon re-arriving at the scene, Ray gave agent Demorest the narcotics in evidence. Upon this evidence the Court found the defendant guilty of the charges contained in Counts III and IV of the Indictment.

The defendant, after having filed his motion for a new trial, and after same had been overruled, and the defend-

ants punishment having been fixed at five years on each Count to run concurrently, defendant appealed to the United States Circuit Court for the Eighth Circuit. The Circuit Court of Appeals affirmed the finding of the trial Judge.

REASON FOR GRANTING WRIT.

1. That this decision is in conflict with **Flecher v. U. S.**, D. C. Cir. 1946, 158 Fed. 2nd 321-322, in that the search was not thorough enough to exclude every reasonable hypothesis that informer did not procure the narcotics elsewhere.

2. That the U. S. Court of Appeals went outside the record to find that the Agents' view were overlapping in that the record does not reveal same to be true but is directly opposite to what the record reveals and the record does not disclose at what point one agent lost sight of defendant and what point the other saw defendant for the second time, thereby causing a break in the chain of sight of defendant.

3. It is therefore submitted that the evidence as a whole is insufficient to sustain a conviction.

ON THE EVIDENCE.

a) At best the government attempts to make its case based upon circumstantial evidence, but in order to do this there must be substantial evidence excluding every other hypothesis but guilt and unless this is done a submissible case is not made, and where all of the evidence is consistent with innocence as with guilt, the reviewing Court must reverse a judgment of conviction. **Salinger v.**

United States, 8 Cir., 23 Fed. 2nd 48-52 (1927); **Tri-angle Club, Inc., v. United States,** 8 Cir., 265 Fed. 2nd 829 (1959); 20 Am. Jur., Evidence, Sec. 1217 (1939); 23 C. J. S., Criminal Law, Sec. 907c (1961).

In this case both Agents at one time lost sight of the informer and consequently the chain of observation was broken and therefore the Court would have to draw its conclusion upon an inference based upon an inference and would have to speculate a guess as to where the narcotics came from or whether or not the informer could have gotten them from his person, or from some other hiding place in the vicinity of the steps. **U. S. v. Ruffin,** 312 Fed. 2nd 232.

ON THE SEARCH.

b) The defendant maintains that the search of the informer was improper in that it was not thorough enough to exclude every reasonable possibility that the informer did not have the narcotic drugs somewhere on his person. There were many areas of the body that was not searched, and in order to convict defendant this Court would have to assume that there were no narcotic on the unsearched areas.

The Court here is asked to speculate with regards to the search but according to the Agent's own testimony (page 27 as to the search) there were several areas of the informer's body that was not searched (Also see Transcript, pages 35-36 as to the search). On pages 35-36 of the transcript Agent Snokhouse testified as follows:

"Q. Now in this search that you made did you search the lapels of his coat?

A. Sir, I don't recall whether or not he had on a

coat but I did make a search of his body by feeling, by touch, and also went through his pocket.

Q. But you just gave him a brief going over, didn't you? You didn't search everything about him.

A. I have seen searches more thorough, but I was satisfied with this search.

Q. You have made more thorough search?

A. Under different circumstances, yes."

The Court's attention is called to the case of **United States v. Flecher**, 81 U. S. App. D. C. 306, 158 Fed. 2nd 321-322.

Here the informer's coat, vest and trouser pockets were searched. The Appeals Court of the District of Columbia said in reversing a conviction:

> "That the search was a little more than a farce and instantly apparent to anyone familiar with the cunningness of a narcotic addict, and the search on the first occasion was totally ineffective in determining whether or not the informer carried narcotics or money."

That case is identical with this one and the same rule should apply.

CONCLUSION.

The evidence is insufficient to sustain a conviction for the following reasons:

a) The search was inadequate.

b) The evidence is as consistent with innocence as with guilt.

c) The Government has failed to make a circumstantial evidence case.

It is therefore submitted that a Writ of Certiorari should be issued.

Respectfully submitted,

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APPENDIX.

Opinion.

UNITED STATES COURT OF APPEALS
for the Eighth Circuit.

No. 17,387

Eunice Byrth, Appellant,

v.

United States of America, Appellee.

Appeal from the United States District Court for the Eastern District of Missouri.

[February 17, 1964.]

Before Van Oosterhout, Matthes and Mehaffy, Circuit Judges.

Mehaffy, Circuit Judge.

Defendant Eunice Byrth has appealed his conviction by the United States District Court, sitting without a jury, for the possession and sale of narcotics in violation of 21 U. S. C. A., § 174, and 26 U. S. C. A., § 4705 (a). The defendant maintains that deficiencies in the Government's circumstantial evidence precluded the trial court from

finding beyond every reasonable hypothesis that the defendant was the source from which an informer working for Federal Narcotics Agents allegedly purchased narcotics.

Viewing the evidence most favorable to the prevailing party, the record of trial indicates that on the evening of May 7, 1962, agents of the Federal Bureau of Narcotics met one Frederic Ray, a narcotic addict, on the street in St. Louis, Missouri. Ray, a former convict and friend of the defendant since they had met while both served sentences together in prison, had volunteered to act as an informer for the agents and attempt to arrange a narcotics sale from defendant, a suspected drug peddler. Agent Jimmie Snokhous testified that in the presence of Agents Edward Demorest and James Parker, he searched Ray, who was seated in a government vehicle's back seat, by examining his pockets, feeling around his waistline, under his armpits, around his ankles, over his shoes, and generally over most of his body. Snokhous found no money or narcotics on Ray's person. Following the search, Agent Demorest accompanied Ray to a nearby telephone booth where the latter placed a call. Demorest's testimony concerning the identity of the party with whom Ray conversed was ruled inadmissible by the trial court. The three agents and Ray then drove to another location, at which time Agents Parker and Snokhous left Demorest and Ray in the government sedan to travel in a special government, panel truck which would take them to the scene of Ray's rendezvous with defendant and provide Snokhous with a hidden vantage point for surveillance of the anticipated purchase of narcotics.

Meanwhile, Agent Demorest drove Ray to the northeast corner of Labadie and Prairie Avenue near Ray's home at 3822 Labadie, the intended meeting place with

defendant. There, Demorest performed a second, but more detailed, search of Ray without requiring him to strip, but who was coatless at the time. Demorest inspected Ray's hat and hatband, felt and looked around his shirt collar, sleeves, arms, armpits, chest and body area, trousers' waistband and pants legs including his stockings and around the inside of the tops of his shoes which were not removed. Again finding no narcotics or money in Ray's possession, except some silver coins, Demorest gave Ray $100.00 in bills of small denominations from official funds before Ray departed the vehicle about 8:00 p. m. and proceeded walking west on the south side of Labadie Avenue towards his house approximately eighty-five yards away. Demorest observed Ray until he reached his yard and turned left into the walkway leading to the front steps of his house.

Agent Snokhous was by this time stationed out of sight at a louvered aperture in the closed panel area of the government truck parked on the north side of Labadie about fifty-five feet directly across from Ray's house. He picked Ray up in his observation walking from the east on Labadie and also saw him turn into his yard and sit down on the steps. Keeping Ray in continuous view, Snokhous testified that the defendant arrived approximately one hour later about 9:30 p. m. by taxi and sat down alongside Ray who had been waiting there since his arrival. Although it was after dark, Snokhous's view was aided by an electric street lamp on his side of the street and the utilization of illuminated binoculars.

According to Snokhous' undisputed testimony, the defendant handed Ray a small, dull colored object; while momentarily thereafter, Ray handed defendant an object, both of which the witness could not identify. Snokhous watched Ray and defendant then walk west on Labadie to-

gether for about seventy-five yards, whereupon they separated, and Ray returned to his former seat on the front steps of his house. Snokhous continued to observe Ray who, about twenty minutes later, proceeded to walk east on Labadie towards the intersection with Prairie Avenue where Agent Demorest awaited his return. Although Ray passed from Snokhous' line of sight, Demorest stated that he first saw Ray approaching at 9:45 p. m. walking east on Labadie about two-thirds of the distance from where he was parked at the intersection to Ray's house. Ray came directly to Demorest and handed him a brown, manila envelope which, upon immediate examination by Demorest, was found to contain a quantity of white powder. Demorest performed another search of Ray, similar to his previous one, finding no other narcotics nor the $100.00 which he had earlier entrusted to him.

Snokhous testified that during his surveillance of Ray's activities, he came in contact with no one other than defendant. Demorest added that he observed Ray contact no one during his walk from the vehicle to his house and while observed en route returning to the agent's vehicle. Both of these witnesses stated that at no time during their observation of Ray did he give the appearance of picking up an object from the ground near his shoes.

Agents Snokhous and Demorest further testified the envelope and its white powder contents were subsequently forwarded to the United States Chemist with the Alcohol and Tobacco Tax Division at Omaha, Nebraska, for analysis. The United States Chemist testified that the white powder contained ten per cent heroin hydrochloride, a narcotic. There was no break in the custody of the narcotics from the time the informer made delivery to the agents until it was analyzed by the chemist and later introduced into evidence at the trial.

The only evidence presented by the defense was defendant's testimony in his own behalf. He denied any sale of narcotics to Frederic Ray on May 7, 1962, or any other date, but on the day of trial, April 3, 1963, he was unable to recollect his activities on the alleged date of the crime. The defendant remembered Ray visiting him several times at his house during the summer of 1962 and acknowledged that he could have visited Ray at his residence on Labadie during that same period. Defendant admitted he had one prior conviction for the possession of marijuana while formerly an addict, but insisted he had never sold narcotics to anyone.

The Government was unable to produce the informer, Frederic Ray, at the trial. Defendant contends that the surveilling agents' testimony (1) regarding the alleged incomplete search of the informer's entire body and clothing prior to his stakeout failed to exclude the reasonable hypothesis that the narcotics were secreted on his person and (2) indicates their observation of the informer was not continual during the events on the date in question so as to exclude the equally reasonable hypothesis that the informer acquired the narcotics from his own person or a hidden stash in the vicinity of his house and not from the defendant.

Ordinarily, to obtain a criminal conviction, the Government bears the burden of proving only that the defendant is guilty beyond a reasonable doubt. However, this Court has recognized the well entrenched principle that in a criminal prosecution where the evidence is wholly circumstantial, the proof must exclude every reasonable hypothesis except the accused's guilt, for a conviction to stand. **Ruffin v. United States**, 312 F. 2d 232 (8th Cir. 1963), cert. denied 373 U. S. 942 (1963); **Tri-Angle Club, Inc. v. United States**, 265 F. 2d 829 (8th Cir. 1959); **Finnegan v. United States**, 204 F. 2d 105 (8th Cir. 1953).

For conviction under the instant indictment, the Government had to establish, whether by direct and/or circumstantial evidence, the facts of defendant's possession and sale of narcotics to the informer on the evening of May 7, 1962. The applicable degree of proof required of these disputed facts depended, in turn, upon whether the evidence presented by the prosecution was wholly circumstantial or not. This evidence consisted in testimony of the two surveilling agents, Demorest and Snokhous. Their testimony represented circumstantial evidence in that it tended to prove the aforementioned disputed facts by proof of other facts which lead the mind to conclude that the facts existed which were sought to be established. **Rumely v. United States**, 283 F. 532 (2nd Cir. 1923), cert. denied 263 U. S. 713 (1923). That is to say, proof that the informer had on his person no narcotics or money, except that furnished him by the agent, before coming in contact with the defendant, that he was continually observed to have come into contact with no other party or repository prior, during, and after his exchange of unidentifiable objects with the defendant, and that, thereafter, he turned over to the agent a substance later proven to contain narcotics having in the interim disposed of the money supplied, excludes every reasonable hypothesis except the inference from the circumstantial evidence that defendant possessed and sold these narcotics to the informer.

For such an ultimate inference to be valid, it must be based upon proven facts as one inference cannot be founded upon another to sustain findings proven by circumstantial evidence. **Wesson v. United States**, 172 F. 2d 931 (8th Cir. 1949). Therefore, the direct evidence, concerning the thoroughness of the informer's preparatory search and his continued observation during his mission,

the facts from which the inference of guilt is drawn, must have been legally sufficient to establish their proof.

Before embarking upon his assignment, the informer's person and clothing were twice searched from head to foot by Agents Snokhous and Demorest. These inspections were exceedingly more meticulous than the single cursory search of only an informer's coat, vest, and trouser pockets found by the court in **Fletcher v. United States**, 158 F. 2d 321, 322 (D. C. Cir. 1946), to have been "little more than a farce." The searches performed by Agents Demorest and Snokhous are more comparable to that described in **Young v. United States**, 297 F. 2d 593, 594-95 (9th Cir. 1962), wherein the court ruled:

> "'There is no merit in appellant's . . . contention that the search of the informer's person prior to his purchase of the narcotics was inadequate. He testified:
>
> "'I took off my Army jacket . . . (the narcotics agent) went through it, and he went through my billfold, spread my handkerchief open, examined the contents of my pocket, searched my shoes, socks, ruffled my hair, and he went all the way through me to see that I didn't have anything else on me.'"

Similarly, in **Dear Check Quong v. United States**, 160 F. 2d 251 (D. C. Cir. 1947), the defendant unsuccessfully contended the informer was improperly searched prior to the alleged purchases. There, the evidence showed that the informer's hair, shirt collar, and cuffs, pockets, trouser waistband, belt and shoes, had been examined.

The only distinction between the informer's search in the case at bar and those held legally sufficient in the **Young** and **Dear Check Quong** cases is that here the search of the informer's shoes did not include removal. Never

theless, we deem the search adequate in view of the surveilling agents' testimony that the informer, while observed, picked up nothing from the ground nor gave the appearance of removing anything from his shoes which would exclude the hypothesis he obtained the narcotics he produced from his own shoes.

Thus, all that remains is the question of the continuity of the agents' observation of the informer's activities from departure until return in order to sustain proof of the above facts, while at the same time eliminating the remaining hypothesis that the informer could have obtained the narcotics from a hidden stash in the vicinity of his house. Agent Demorest stated that after dispatching Ray with his last minute instructions, he kept him under view until he turned into the yard of his house. Agent Snokhous, stationed across the street from Ray's house in the government truck, spotted Ray prior to this and continued to observe his activities throughout his meeting with defendant and until Ray reached a point beyond Snokhous' scope of view from the truck while en route east on Labadie in return to the government vehicle driven by Demorest. Demorest sighted Ray returning approximately two-thirds of the eighty-five yard distance from the intersection to his house and continuously followed him back to the automobile. Therefore, before Ray left the view of Snokhous, he undoubtedly came within the sight of Demorest as the two agents' scopes of observation were overlapping. The evidence satisfies proof of the fact that the informer's movements were continuously observed justifying the conclusion the narcotics were not obtained from a hidden stash.[1]

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[1] See *Young v. United States*, supra, wherein the defendant's conviction for unlawful sale of narcotics was upheld upon circumstantial evidence despite the fact the surveilling agents only observed the informer and defendant both enter and exit an apartment building where the latter resided, but did not witness the actual transfer which occurred inside.

Having reviewed the entire record of evidence which confirms the finding all reasonable hypotheses except defendant's guilt were excludable, we are compelled to sustain the district court's judgment of conviction.

Affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit

BRIEF FOR THE UNITED STATES IN OPPOSITION

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 932

EUNICE BYRTH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (R. III, 1-9) is reported at 327 F. 2d 917.

JURISDICTION

The judgment of the court of appeals was entered on February 17, 1964 (R. III, 10). The petition for a writ of certiorari was filed on March 18, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the evidence was sufficient to support petitioner's conviction for sale of narcotics.

720-931—64

STATEMENT

After waiver of a trial by jury (R. I, 14), petitioner was convicted by the United States District Court for the Eastern District of Missouri for narcotic offenses in violation of 21 U.S.C. 174 and 26 U.S.C. 4705(a). He was sentenced to concurrent terms of imprisonment of five years (R. I, 70). The court of appeals affirmed.

The government's evidence showed that on May 7, 1962, federal narcotic agents Snokhous, Demorest, and others met one Frederic Ray, a narcotic user who had volunteered to cooperate with the officers (Tr. 25, 27), at a street point in St. Louis (Tr. 5). At this time Agent Snokhous searched Ray and determined that Ray had no currency or narcotics on his person (Tr. 6–7).

Thereafter, Ray and Agent Demorest left the others to enter a telephone booth where Ray placed two telephone calls (Tr. 7, 53). Ray and Demorest, still together, then drove to Labadie and Prairie Streets and parked at a point about 80 yards from Ray's residence at 3822 Labadie (Tr. 57, 69). There Ray was searched by Demorest who testified (Tr. 58–59):

> I made a detailed search of his person * * * Beginning with the top and working down, I searched Ray's hat and hatband and the portions of the hat where an object could be concealed, then searched around his collar at the neck, the sleeves and arms, looked under the armpits, the chest and body area, around the waistband of the trousers, and continued on down the legs including the stockings. I did not have him remove his shoes.

Demorest explained that he inspected Ray's shoes to the extent of "searching around the tops of the socks and feeling for anything which would be readily available within the shoes" (Tr. 59). The search revealed no currency or narcotics on the person of Ray (Tr. 57, 60).

After the search, Demorest handed Ray $100 in small bills and gave him last minute instructions. At 8 p.m. Ray alighted from the parked car (Tr. 69) and Demorest watched him while he walked directly west from the intersection one-third of the way up the block where he turned into the walkway leading to his house (Tr. 58, 60, 61).

At this moment Agent Snokhous was concealed inside a "surveillance vehicle" (a pickup truck with louvered windows (Tr. 46)) parked on the north side of Labadie Street almost directly in front of Ray's residence (Tr. 9). There was good lighting provided by a street light and Snokhous was equipped with "night" binoculars (Tr. 31, 35, 39). Snokhous saw Ray walking west on the south side of the street. He saw Ray turn into his residence and seat himself and remain on the top step of his front porch (Tr. 10). An hour later petitioner appeared and seated himself next to Ray. Petitioner handed Ray a square, dull object and Ray handed something to petitioner in return (Tr. 12, 35). It was then about 9:25 p.m. (Tr. 13). Petitioner and Ray stood and walked west some 75 yards, then separated. Petitioner continued walking west and disappeared. Ray returned to his residence and again seated himself on the top step (Tr. 13–14). Ray remained seated

there for 20 minutes, then arose and walked east until he disappeared from the view of Snokhous (Tr. 14)

At this time, 9:45 p.m., Ray, walking east on Labadie Street, came into the view of Agent Demorest who was still parked at the intersection of Labadie and Prairie (Tr. 61). Ray was then at the point of the fourth house from the corner, approximately two thirds of the distance from the intersection to his residence (Tr. 62). Ray came directly to Demorest and handed him a small manila envelope (Tr. 62) which was found to contain heroin (Tr. 74–80). A search of Ray revealed no money on his person (Tr. 62–63).

Both officers testified that Ray, on his walks to and from his residence, did not contact any person or reach downward toward his shoes or stop to pick up any object. Snokhous said that, except for Ray's contact with petitioner, the same was true with respect to the time Ray spent in front of his residence (Tr. 10, 14, 15, 61, 62).

ARGUMENT

Both courts below properly found the evidence sufficient to support petitioner's conviction for sale and possession of narcotics. From the testimony of the officers the trier of fact could conclude that the search of the addict Ray was thorough enough to preclude the possibility that he had the manila envelope containing heroin on his person prior to his contact with petitioner. See *Young* v. *United States*, 297 F. 2d 593 (C.A. 9), certiorari denied, 369 U.S. 891. The officers' observations of Ray negated the possibility

that he could have secured the envelope of narcotics from a source other than petitioner or that he could have transferred the money otherwise. One of the officers did in fact see an exchange taking place between Ray and petitioner. Moreover, it is clear from the time of the officers' observations and the proximity of their stations to the residence of Ray that the addict was at all times within the sight of one of the officers.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY 1964

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